Notice: This decision may be formally revised before it is published in the *District of Columbia Register*. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
DAMOND SMITH, Employee	OEA Matter No. J-0063-09
	Date of Issuance: December 6, 2010
OFFICE OF THE CHIEF FINANCIAL OFFICER, Agency	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Damond Smith ("Employee") worked as a Program Analyst for the Office of the Chief Financial Officer ("Agency"). On October 2, 2008, he received a letter of termination from Agency. The letter provided that an Agency background investigation revealed that Employee was convicted of unlawful entry in April of 2004. It went on to note that the criminal act is relevant to Employee's job duties and activities and demonstrated a lack of discretion, judgment, and disregard for confidential issues. Therefore, Employee was terminated effective October 6, 2008.[1]

On December 17, 2008, Employee appealed his termination to the Office of Employee

[1] *Petition for Appeal,* p. 11 (December 17, 2008).

Appeals ("OEA"). In his Petition for Appeal, he argued that the unlawful entry was a misdemeanor conviction that did not impact his job duties. He went on to provide that he was fully aware that his Petition for Appeal was untimely filed with OEA. However, he asserted that his untimely filing resulted from misinformation given to him by his union representative. Employee contended that his representative informed him that he would have to complete the grievance procedure before he could file his matter with OEA. Therefore, he requested that OEA grant him a hearing.[2]

Agency responded to Employee's Petition for Appeal on July 13, 2009. It provided that under Article 7, Section 13 of the collective bargaining agreement, Employee had the option to either grieve his termination through the negotiated grievance procedure or appeal to OEA, but he could not do both. Agency contended that on October 27, 2007, Employee chose to appeal through the grievance procedure. On November 24, 2009, it denied Employee's grievance and sustained his termination. Thereafter, Employee's union representative refused to take his grievance to arbitration.[3]

On July 16, 2009, the OEA Administrative Judge ("AJ") issued his Initial Decision. He reasoned that in accordance with OEA Rule 629.2, 46 D.C. Reg. 9317 (1999), Employee had the burden of proving OEA's jurisdiction over his case. The AJ held that under D.C. Official Code Section 1-616.52, Employee could use the negotiated grievance procedure or OEA but not both. He also provided that the D.C. Official Code and the collective bargaining agreement clearly provided that once an employee selected the review procedure, then that choice is the exclusive

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[2] *Id.,* 1-5.
[3] It should be noted that Agency also argued that Employee's petition should be dismissed because it was untimely. Consequently, it requested that Employee's appeal be dismissed for lack of jurisdiction or untimeliness. *Employer's Response to Jurisdiction Issue,* p. 1-2 (July 13, 2009).

method of review. Thus, because Employee elected to grieve the matter through the collective bargaining agreement, then OEA lacked jurisdiction over his case. Moreover, the AJ held that the time limit to file an appeal with the Office is mandatory and jurisdictional in nature. Accordingly, Employee's untimely appeal can be dismissed on that ground. As a result, the AJ dismissed Employee's case.[4]

Employee filed a Petition for Review on August 18, 2009. Similar to the arguments presented in his Petition for Appeal, Employee contended that he relied on inaccurate notification regarding his appeal rights and he was given improper information from his union regarding his OEA appeal rights. Employee admitted to filing a grievance with Agency before filing his appeal with OEA. He, again, provided that he did this because he was instructed by the union that he had to before he could move forward in any other appeals. Moreover, Employee argued that he did not formally learn of his termination until November 11, 2008. Accordingly, he requested that OEA assume jurisdiction over his matter in light of the inaccurate information that he received from his union.[5]

In the current matter, there was a collective bargaining agreement between Agency and Employee that addressed where and how appeals should filed. The relevant portion of the agreement is provided in Article 7, Section 13. It provides that:

> except as provided in Section 14 of this Article, employees may grieve actions through the negotiated grievance procedure, or appeal to the office of Employee Appeals (OEA) in accordance with OEA regulations but not both. Once the employee has selected the review procedure, that choice shall be the exclusive method of review.[6]

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[4] *Initial Decision,* p. 2-3 (July 16, 2009).
[5] *Petition for Review* (August 18, 2009).
[6] *Employer's Response to Jurisdiction Issue,* Exhibit #8 (July 13, 2009).

In addition to the language of the collective bargaining agreement, D.C. Official Code § 1-616.52 (e) and (f) provide that:

> (e) Matters covered under this subchapter that also fall within the coverage of a negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either pursuant to § 1-606.03, or the negotiated grievance procedure, but not both.
>
> (f) An employee shall be deemed to have exercised their option pursuant to subsection (e) of this section to raise a matter either under the applicable statutory procedures or under the negotiated grievance procedure at such time as the employee timely files an appeal under this section or timely files a grievance in writing in accordance with the provision of the negotiated grievance procedure applicable to the parties, whichever event occurs first.

Hence, we must determine which appeal route Employee elected to use first as it pertains to his appeal options. OEA held in *Robert Mayfield v. D.C. Department of Health,* OEA Matter No. J-0105-08, *Opinion and Order on Petition for Review* (April 5, 2010), __D.C. Reg. ___ ( ), that this is of particular importance because if an employee chooses to use the negotiated grievance process, then OEA would lack jurisdiction to consider the matter.

According to Agency, Employee filed a grievance on October 27, 2009. It issued its decision on November 24, 2009. Employee did not file his Petition for Appeal until December 17, 2008, nearly two months after he filed his grievance with Agency. Thus, in accordance with the collective bargaining agreement and the D.C. Official Code, Employee elected to use the grievance procedure with Agency instead of appealing to OEA. Therefore, OEA lacks jurisdiction to consider this case.[7]

Assuming arguendo that Employee could prove that OEA should consider this matter,

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[7] It should be noted that Agency clearly provided in Employee's termination notice that he had the option to grieve or appeal its final decision to OEA. The termination notice also provided the procedure for each option. *Petition for Appeal,* p. 11 (December 17, 2008).

OEA would still lack jurisdiction because of Employee's untimely filed Petition for Appeal. D.C. Official Code § 1-606.03 provides that

> "An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIIII-A of this chapter), an adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more (pursuant to subchapter XXIV of this chapter), or a reduction-in-force (pursuant to subchapter XXIV of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office upon the record and pursuant to other rules and regulations which the Office may issue. Any appeal shall be filed within 30 days of the effective date of the appealed agency action."

Moreover, OEA Rule 604.2 provides that "an appeal filed pursuant to Rule 604.1 must be filed within thirty (30) days of the effective date of the appealed agency action."

Therefore, Employee's appeal should have been filed within 30 days of his October 6, 2008, effective date of termination. It was not filed until December 17, 2008, which was 72 days after the effective date. Moreover, Employee concedes in his Petition for Appeal that it was filed untimely.[8] OEA has consistently held that time limits for filing appeals are mandatory in nature.[9] In accordance with OEA Rule 629.2, Employee has the burden of proving issues of jurisdiction including the timeliness of his filing. Because Employee failed to prove that his petition was timely filed with OEA, we must dismiss his case.

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[8] *Petition for Appeal,* p. 5 (December 17, 2008).

[9] *Alfred Gurley v. D.C. Public Schools,* OEA Matter No. 1601-0008-05, *Opinion and Order on Petition for Review* (April 14, 2008), __ D.C. Reg. __ ( ) citing *District of Columbia Public Employee Relations Board v. District of Columbia Metropolitan Police Department*, 593 A.2d 641, 643 (D.C. 1991) and *Thomas v. District of Columbia Department of Employment Services*, 490 A.2d 1162, 1164 (D.C. 1985); *James Davis v. Department of Human Services,* OEA Matter No. 1601-0091-02, *Opinion and Order on Petition for Review* (October 18, 2006), __D.C. Reg. __ ( ).

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is **DISMISSED**.

FOR THE BOARD:

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Clarence Labor, Chair

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Barbara D. Morgan

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Richard F. Johns

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.